Supreme Court, U.S.
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No. 00-192

In the Supreme Court of the United States

RUBEN HUGHES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district court erred in sentencing petitioner to life imprisonment for drug offenses in the absence of jury findings on the quantity of drugs involved in petitioner's offenses or petitioner's leadership role in those offenses.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 213 F.3d 323.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2000. The petition for a writ of certiorari was filed on July 24, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the Northern District of Illinois, petitioner was convicted of one count of conspiracy to possess cocaine and cocaine base with intent to distribute them, in violation of 21 U.S.C. 846, four counts of distributing cocaine or cocaine base, in

violation of 21 U.S.C. 841(a)(1), and one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). On January 13, 1999, the district court imposed a sentence of life imprisonment on the drug counts and a concurrent sentence of ten years' imprisonment and a $10,000 fine on the firearm count. The court of appeals affirmed the conviction and sentence. See Pet. App. A1-A2.

1. From 1989 until June 26, 1997, petitioner operated a string of crack houses in Joliet-Lockport, Illinois. Pet. App. A2-A5. Petitioner personally sold drugs to an informant working with police officers four times between January and June of 1997. *Id.* at A4. On June 26, 1997, petitioner was found in possession of two handguns. *Id.* at A5. At petitioner's trial, the jury found him guilty on all of the counts with which he was charged. *Id.* at A6. The jury was not instructed that it had to find that petitioner possessed any particular quantity of drugs in order to convict him on the drug counts.

At sentencing, the district court found that petitioner was responsible for at least 1.5 kilograms of cocaine base and played a leadership role in the conspiracy. Pet. App. A22, A24-A25. Petitioner had previously been convicted of the state felony drug offense of possession of a controlled substance with intent to deliver it. Presentence Investigation Report ¶ 43. Based on those findings, the Sentencing Guidelines indicated that petitioner should be sentenced to life imprisonment. See *id.* ¶¶ 28, 31, 43, 90. The district court imposed that sentence.

2. On appeal, petitioner argued, *inter alia*, that he did not have a sufficient opportunity to discuss the presentence report with his attorney before sentencing, that the district court improperly failed to resolve

alleged contradictions in the evidence before making its drug quantity findings, and that the evidence was insufficient to find that petitioner had a leadership role in the offense. See Pet. C.A. Br. 34-49. The court of appeals rejected all of petitioner's contentions and affirmed his conviction and sentence. See Pet. App. A2. The court held that the district court's drug quantity findings were "very conservative" and supported by "the overwhelming weight of the testimony presented at trial." *Id.* at A23-A24.

ARGUMENT

1. Petitioner argues (Pet. 5-9) that his sentence was imposed in violation of this Court's decision in *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000). In *Apprendi*, the Court held that, as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362-2363.

a. Petitioner mistakenly states (Pet. 6-7) that his sentence, unlike that of the defendant in *Apprendi*, did not exceed the "normal statutory maximum." Petitioner's drug offenses were subject to the graduated penalties set forth in 21 U.S.C. 841(b) (1994 & Supp. IV 1998). Under that subsection, a defendant with a prior felony drug conviction can be sentenced to life in prison if his offense involves 50 grams or more of cocaine base. See 21 U.S.C. 841(b)(1)(A)(iii). Where no drug quantity is found, however, the maximum term of imprisonment applicable to a defendant with a prior drug felony conviction is 30 years. See 21 U.S.C. 841(b)(1)(C) (1994 & Supp. IV 1998). The statutory maximum term of imprisonment applicable to petitioner on each count

therefore was 30 years.[1] Petitioner, however, received a sentence of life imprisonment. That sentence was permissible only by virtue of a fact (involvement in the offense of more than five grams of cocaine base) that was not found by the jury. Imposition of a sentence of life imprisonment was thus error under this Court's decision in *Apprendi*.

b. Petitioner also maintains that the district court violated *Apprendi* by selecting a sentence within the statutory range based on facts not found by the jury, namely the drug quantities and his leadership role. This Court has upheld the use and operation of the Sentencing Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and has made clear that, so long as the statutory minimum and maximum sentences are observed, it is constitutionally permissible for the Guidelines to establish presumptive sentencing ranges on the basis of factual findings made by the sentencing court by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S. 511, 513-514 (1998) (Guidelines "instruct *the judge* * * * to determine" type and quantity of drugs for which a defendant is accountable "and then to impose a sentence that varies depending upon amount and kind.").

Apprendi did not hold otherwise. See *Apprendi*, 120 S. Ct. at 2366 n.21 ("The Guidelines are, of course, not

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[1] The district court would have statutory authority to run those terms consecutively, for a cumulative maximum term of 150 years' imprisonment. See 18 U.S.C. 3584. The Guidelines also address the circumstances under which sentences on multiple counts should be run consecutively to achieve the total punishment determined under the Guidelines. Guidelines § 5G1.2. The constitutionality of a sentence under *Apprendi*, however, turns on whether the sentence on a particular count exceeds the prescribed statutory maximum. 120 S. Ct. at 2354.

before the Court. We therefore express no view on the subject beyond what this Court has already held.") (citing *Edwards*, 523 U.S. at 515). The Guidelines merely "channel the sentencing discretion of the district courts and * * * make mandatory the consideration of factors" that courts have always had discretion to consider in imposing a sentence up to the statutory maximum. *Witte* v. *United States*, 515 U.S. 389, 400-404 (1995); see also *United States* v. *Watts*, 519 U.S. 148, 155-156 (1997) (per curiam). District courts have the power to "depart from the applicable Guideline range if 'the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *Koon* v. *United States*, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. 3553(b)). Because the Guidelines leave the sentencing court with significant discretion to impose a sentence within the statutory range, and because specific offense characteristics and sentencing adjustments under the Sentencing Guidelines cannot increase the statutory maximum penalty for a criminal offense, *Apprendi* does not support a challenge to the constitutionality of the Guidelines. See Sentencing Guidelines § 5G1.1; *Edwards*, 523 U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines").

c. Petitioner did not raise his constitutional claim in either court below, and that claim may therefore be considered only under a plain-error standard. Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461 (1997). The error in imposing a life sentence based on quantity findings made by the court at sentencing was "plain," in that it was "clear" or "obvious" after the

decision in *Apprendi*. See *Johnson*, 520 U.S. at 467-468 ("where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration"). Petitioner is not entitled to relief, however, unless he can also demonstrate both that the error "affect[ed] substantial rights" and that it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467.

Petitioner will be hard pressed to meet that standard, for two reasons. First, as the court of appeals noted, "the overwhelming weight of the testimony presented at trial amply supports the district court's finding that [petitioner] was responsible for the very conservative figure of 1.5 kilograms of cocaine base." Pet. App. A23-A24. That is 30 times the amount required to subject petitioner to a maximum sentence of life imprisonment under Section 841(b)(1)(A) (1994 & Supp. IV 1998). See *Johnson*, 520 U.S. at 470 (error in failing to submit element to the jury did not affect the fairness, integrity, or public reputation of judicial proceedings where the evidence on the element was overwhelming and uncontested). Second, there is no practical difference between defendant's actual sentence of life imprisonment and the cumulative statutory maximum of 150 years' imprisonment to which he could have been sentenced. See note 1, *supra*. Nevertheless, it would be appropriate to allow petitioner an opportunity to make the requisite showings to the court of appeals in the first instance, and, accordingly, the case should be remanded to the court of appeals for further consideration.

2. Although petitioner includes only the *Apprendi* issue in his questions presented, see Pet. i, he appears to argue (Pet. 5-6 n.2) that review should also be

granted to determine "whether a preponderance standard should apply when so-called sentencing factors significantly increase a sentence." The preponderance of the evidence standard has long been applied to sentencing factors, both by this Court, see *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), and by the courts of appeals. See note 2, *infra*. This Court has noted the existence of a divergence of opinion among the courts of appeals on whether, in "extreme" circumstances, due process might require a higher standard than preponderance of the evidence in making findings under the Sentencing Guidelines. See *Watts*, 519 U.S. at 156 & n.2; accord *Almendarez-Torres* v. *United States*, 523 U.S. 224, 247-248 (1998). The United States recently filed a petition for a writ of certiorari seeking resolution of that issue. *United States* v. *Reed*, No. 99-1096 (filed Dec. 29, 1999) (seeking review of *United States* v. *Hopper*, 177 F.3d 824 (9th Cir. 1999), cert. denied, 120 S. Ct. 1179 (2000)).[2] In *Reed*, the court of appeals remanded a case for resentencing, based on the court of appeals' holding that certain sentencing factors had to

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[2] We explained in our petition in *Reed* that there is a conflict between the decision of the Ninth Circuit in that case requiring proof (in certain circumstances) of a sentencing factor by clear and convincing evidence and decisions of the Tenth, First, and Fourth Circuits. See 99-1096 Pet. at 14-16 (citing *United States* v. *Washington*, 11 F.3d 1510, 1516 (10th Cir. 1993), cert. denied, 511 U.S. 1020 (1994); *United States* v. *Lombard*, 102 F.3d 1 (1st Cir. 1996), cert. denied, 520 U.S. 1266 (1997); *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1237-1239 (4th Cir.), cert. denied, 493 U.S. 943 (1989)). We are aware of no appellate decision outside the Ninth Circuit that has required proof of a sentencing factor (as opposed to a ground for a substantial departure) by more than a preponderance of the evidence. See also *United States* v. *Mezas de Jesus*, 217 F.3d 638 (9th Cir. 2000); *United States* v. *Valensia*, No. 99-10170, 2000 WL 1051865, at *3-*9 (9th Cir. Aug. 1, 2000).

be proven by clear and convincing evidence because of their effect on the defendant's sentence. When the district court reimposed the same sentence on remand after finding the sentencing factors under the court of appeals' standard, the certiorari petition was dismissed on the government's motion. *United States* v. *Reed*, 120 S. Ct. 1578 (2000).

This case is not a suitable vehicle for resolving any disagreement among the circuits on the burden of proof at sentencing. Petitioner apparently now objects to the use of the preponderance standard in determining the quantity of drugs attributable to him and his leadership role in the offense. Pet. 5. In the court of appeals, however, petitioner conceded that the preponderance standard governs drug quantity calculations, see Pet. C.A. Br. 40 ("The government shoulders a preponderance burden of proving drug quantity."), and he did not argue that any other standard governs the finding that he was an organizer or leader of a criminal activity. Accordingly, the court of appeals did not address the question whether any standard higher than preponderance of the evidence should have been applied in sentencing petitioner under the Guidelines. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation omitted); see *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Moreover, as the court of appeals noted, the "overwhelming weight of the testimony presented at trial amply supports the district court's finding" regarding drug quantity, Pet. App. A23-A24, and "[t]he record clearly supports that [petitioner] was the leader of an extensive drug operation with numerous employees and participants," *id.* at A25. In those circum-

stances, there is no reason to conclude that resolution of the standard of proof issue would have any effect on petitioner's sentence. Further review to determine the standard applicable to factual findings at sentencing is accordingly unwarranted.

CONCLUSION

With respect to petitioner's claim that the district court erred by sentencing him in accordance with 21 U.S.C. 841(b)(1)(A) (1994 & Supp. IV 1998), in the absence of a jury finding concerning the quantity of drugs involved in his offenses, the petition for a writ of certiorari should be granted, the judgment should be vacated, and the case should be remanded for further consideration in light of *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000). In all other respects, the petition should be denied.

Respectfully submitted.

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